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CONSTITUTION OF THE UNITED STATES OF AMERICA

Sixth Amendment 13
Fourteenth Amendment 13

NO. 805

IN THE

Supreme Court of the United States

October Term, 1970

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

THADDEUS KING, JR., *Respondent*

RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

A. INTRODUCTION

The Petitioner, the State of Texas, has made application for writ of certiorari to this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the captioned cause on July 6, 1970. See 429 F.2d 221.

B. LOWER COURTS' RULINGS

The Court's attention, as to the lower Courts' rulings, is directed to Appendix "A", the opinion of the Fifth

Circuit, and Appendix "B", the memorandum and order of the United States District Court for the Southern District of Texas, Houston Division. See Petitioner's Application, pages 23-26.

The response will be limited to replying to the three (3) questions the Petitioner has presented to this Honorable Court and Petitioner's statements regarding why the application for writ of certiorari should be granted.

C. FACTS OF CAUSE

A further recitation of the facts concerning this cause is considered unnecessary and this Honorable Court is directed to the decisions by the District Court and the Fifth Circuit found at 305 F. Supp. 636, and 429 F.2d 221. Further, as the Honorable Court of Appeals pointed out on page 222 of their opinion, the following is seen:

> . . . The District Court here, through its Findings of Facts, has chosen to discredit much of the testimony of the state's witnesses and to accept much of that of petitioner's witnesses. Such decision is supported by the record in this case. . . (222).

D. STATEMENT OF THE RESPONDENT REGARDING CONFLICTS OF THE CIRCUITS AND FACT QUESTION PRESENTED HAS NOT HERETOFORE BEEN SPECIFICALLY DECIDED BY THIS COURT

The Respondent does not quarrel with Petitioner's statements regarding the conflicts within the various Circuits regarding the issues involved in this application for writ of certiorari. Further, the Respondent does not quarrel with the fact the Federal questions herein have

not heretofore been specifically determined by this Honorable Court.

E. QUESTIONS PRESENTED AND RESPONSE THERETO

The Petitioner has presented the following questions for review:

> Under the circumstances, was King deprived of these rights protected by the:
>
> (1) due process clause of the Fourteenth Amendment even though he was not represented by appointed counsel;
>
> (2) due process and equal protection clause of the Fourteenth Amendment where the State of Texas had no actual notice of the inadequacies, misconduct, or lack of preparation of King's own attorneys.
>
> (3) Whether the State of Texas denied King "the Assistance of Counsel for his defense" that is guaranteed by the Sixth Amendment to the Constitution of the United States where he chose his own counsel to guide him through his trial.

When all of the questions have been asked and answered and the circle has been drawn, what the Petitioner, the State of Texas, is attempting to say to this Honorable Court is there is a Constitutional dichotomy between retained counsel and assigned counsel regarding the legal standards as to the competency of counsel and if an individual has retained counsel in a criminal trial he assumes full responsibility for the individual attorney's competency or incompetency to assist the accused in his defense.

Recently, an article of interest written by Hon. Sam Polur entitled "Retained Counsel, Assigned Counsel: Why the Dichotomy?" appeared in Volume 55, Pages 254-256, of the *American Bar Association Journal*.

In his conclusion, after reviewing many of the leading cases on this point, Mr. Polur said:

> I am not urging a new standard but vigorously proposing an abolition of the dual standard which now exists. This is not fair to the criminal accused who happens to have sufficient means to retain counsel. It surely demeans the constitutional bulwarks of equal protection of the laws and due process of law. Surely, each man accused and tried is entitled equally to the protective mantle of our Sixth Amendment's right to counsel. To give him less denigrates the American heritage of justice for all. (256).

There should be little question that when a client is convicted and receives more than his share of "justice" due to a criminal trial, that particular client is going to be unhappy. This is human nature. However, the Petitioner's concern seems to be that by holding the retained counsel to the same standard as the court appointed standard the gates to the penitentiary will be opened. This reasoning is specious to say the least.

The Petitioner is further saying that "The State of Texas did not deny Respondent the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution." The Supreme Court of Texas, however, is the State agency which brought into existence Respondent's trial attorney as a licensed member of the Bar. The Supreme Court of the State of Texas is also the State

agency which, indirectly at least, suspended Respondent's trial attorney for thirty-three (33) months where it was found that the same attorney substituted another person for his client in a workmen's compensation hearing. By formal complaint, the Respondent's trial attorney was charged with "conduct . . . so gross, deliberate, dishonorable and fraudulent as to require his disbarment from the further practice of law." See Volume 33, No. 4, April 22, 1970, *Texas Bar Journal*, page 294. The State giveth and the State taketh it away.

The average layman entrusts his destiny into the hands of a person the State of Texas has certified to be competent. The average layman probably has no more conception of an attorney's competency or incompetency than an attorney who relies upon a stranger physician for medical treatment.

Unquestionably, each case must be judged upon its own facts to determine whether an individual did or did not receive the effective assistance of counsel.

Also, it is the totality of the circumstances of a case in determining whether an individual did or did not have the effective assistance of counsel. Of course, in cases where the extremes are shown, courts have little difficulty in reaching the proper end result. It is in cases where the black and white join that the difficulty occurs.

Unless the individual is professionally trained to be an attorney, upon what basis can he stand up and say "Look Judge, this attorney does not know what he is doing." The chances are relatively good that the trial judge would make him sit down anyway.

And what is wrong with a trial judge guiding and steering the course of a man's defense if the trial judge

sees or can draw the inference that the attorney does not appear to be doing a good job?

Unfortunately, most attorneys go through on-the-job apprenticeship training and literally learn by doing; sometimes to the client's detriment. Some attorneys have garnered thirty years of experience but every year's experience is *a repeat* of the first year.

In the narrow issue presented by this Application for Writ of Certiorari, we are, of course, not dealing specifically with the following:

1. We are not concerned with the accused's per se right to counsel at trial either under the Federal Sixth or Fourteenth Amendments to the Constitution. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 79.

We are, of course, dealing with the grave issue of competency of counsel as a Constitutional issue under the Sixth and the Fourteenth Amendments to the Constitution where the individual had retained counsel and is tried in a court of law.

The progenitor of the right to counsel, as we probably know of that right today, is *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, 53 S.Ct. 55.

However, what is usually not recognized is that the right to counsel encompasses effective assistance of counsel.

It is submitted that *Powell*, supra, from the opinion, stands for two propositions:

1. The right to have counsel appointed by the trial court in a capital case; and

2. The right of counsel so appointed to have a reasonable period of time for preparation for trial.

Mr. Justice Sutherland stressed the importance of the former when he pointed out that it was not shown except by a colloquy several days after arraignment that an appointment of counsel had been made; but the record was blank as to whom, when or under what circumstances an appointment of counsel was made. As to the latter, conceding the right to counsel, his Honor pointed out:

> Not only was that not done here (the first proposition), but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. (the second proposition). (58)
>
> That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial. (59).

In discussing the applicability of the Sixth Amendment on the States Mr. Justice Sutherland further said:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226, 17 S.Ct.

> 581, 41 L.Ed. 979. If it is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts makes it clear that the right to the aid of counsel is of this fundamental character. (63).

This Honorable Court further held that the trial court failed to make an effective appointment of counsel and this, too, was a denial of due process within the meaning of the Fourteenth Amendment. (65). It is the latter statement which most authors appear to seize upon when discussing incompetency or ineffective assistance of counsel.

We have travelled far since *Powell, supra,* but the issue in this cause does not concern the focusing of attention on "first level implications", but on the more grave issue of the following: "If the Constitution requires more than "providing warm bodies with law degrees, then how much more?" "How good must counsel be in order to satisfy minimum constitutional requirements?" See James R. Craig, "The Right to Adequate Representation in the Criminal Process: Some Observations", Volume 22, No. 2, 1968, *Southwestern Law Review*, Page 260.

Probably the real question is the following: If an individual is entitled to have the assistance of counsel for his defense in a criminal trial, pursuant to the Sixth Amendment, does this assistance include the effective or competent assistance or will any type assistance do? What must a warm body with a law degree do?

In this cause, there is no question that the Respondent had a "warm body" standing beside him. A United States District Court and the Circuit Court for the Court of Appeals for the Fifth Circuit has held that this "warm body" was inadequate and ineffective to satisfy the Constitutional requirement of assistance of counsel.

Thus, to isolate the issue in this response is not to ignore those historical and revolutionary cases such as *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792; *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377; *Smith v. O'Grady*, 312 U.S. 329 61 S.Ct. 572, 85 L.Ed. 859; *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493; *Pointer v. Texas*, 380 U.S. 400, and *Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, but to use them as a stepping stone and proceed directly into the waters of the ineffective, inadequate and incompetent attorney.

In *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, Mr. Justice Murphy, in a factual situation where the trial court, though advised of the possibility that conflicting interests might arise which would diminish an attorney's usefulness to the defendant for whom the attorney had entered his appearance as an associate counsel, appointed the attorney as the codefendant's counsel, held that this denied the defendant his right to have the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution. (467-468).

In *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167 former Mr. Justice Clark, writing for a unanimous court,

discussed a procedural rule of the State of Georgia which required that objections to a Grand Jury must be made before the Indictment is returned. It was held that the defendant Reece did not have the assistance of counsel until after he was indicted. Quoting from *Powell, supra*, Mr. Justice Clark said:

> The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard. Georgia should have considered Reece's motion to quash on its merits. (171).

In *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, Mr. Justice Reed also speaking for a unanimous court, it was held that the "denial of effective assistance of counsel does violate due process." (118). The Court concluded under the facts:

> We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury.
>
> We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment. (120).

This Honorable Court in *White v. Ragen*, 324 U.S. 760, 65 S.Ct. Rep. 978, where one of the Petitioners in that cause made allegations similar to the one at Bar, held:

> . . . it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel. (980).

Even though the Sixth Amendment does not contain the adjective "effective" as a modifier to the word "Assistance", it is submitted this is most certainly implied. In *Avery v. Alabama, supra*, Mr. Justice Black pointed out in his opinion that a warm body was not enough. "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." (322).

In *Michel v. Louisiana*, 350 U.S. 91, 76 Sup.Ct. Rep. 158, Mr. Justice Clark, again writing for a majority of the Court, discussed the allegation of denial of effective representation of counsel. The issue surrounded several alleged facts:

1. Failure to file a motion to quash;
2. Age of the attorney; and
3. Health of the attorney.

This Honorable Court, accepting the trial court's and the Supreme Court of Louisiana's findings that the facts did not show a lack of effective counsel, held, after considering that the attorney was a well-known criminal lawyer with nearly fifty years' experience at the bar, that: "The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness." *U. S. ex rel. Feeley v. Ragen*, 7 Cir., 166 F.2d 976. "The delay might be considered sound trial strategy, particularly since the codefendant could not be found." "We cannot infer lack of effective counsel from this circumstance alone." "Such an inference would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial." (164).

However, by the findings of fact by the District Court in the case at Bar, this Respondent, not in reference to

one thing, but many things, did not receive nor did he have the effective assistance of counsel during his trial.

Here, petitioner was arrested on January 24, 1966, almost nine months before his trial. In the early part of February, petitioner's aunt, Ola Jones, contacted an attorney to represent petitioner in the matters pending against him. A fee was agreed upon and paid. Thereafter this attorney, together with an associate, went to the Harris County Jail and talked to petitioner. At the examining trial the associate appeared on behalf of petitioner. Other than the first visit and the examining trial, neither the employed attorney nor his associate ever contacted petitioner again prior to his trial. At the trial, petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office. This attorney (the one appearing on behalf of petitioner at the trial) had a casual look at petitioner while petitioner was in jail, but no contact was had with petitioner and this attorney never visited with petitioner while petitioner was in jail. The one and only time this "trial attorney" ever conferred with petitioner was on the day of trial. That conference lasted something less than thirty minutes. Petitioner's trial began at 1:40 P.M. and ended the same afternoon at 3:15 P.M. When the state offered into evidence heroin, no objection was made, although the heroin introduced into evidence was heroin allegedly thrown from a car and picked up on the street. Apparently, no fingerprints were made of the package containing the heroin to determine whether petitioner actually handled it. Petitioner claimed to have had certain witnesses he wanted to call on his behalf, but the "trial attorney" refused to call them. At the habeas hearing the "trial attorney" testified

> he did not see any reason to put these witnesses on the stand even though he never talked to them. The only evidence the "trial attorney" offered on the point of whether or not in his opinion he rendered effective assistance of counsel was his expressed opinion that he did everything petitoner wanted him to do. This Court concludes that the "trial attorney" actually wanted petitioner to plead guilty but petitioner refused, expressing his innocence at that time. At the conclusion of the trial petitioner was sentenced to 16 years, even though from the time of his arrest to the present he has strongly insisted upon his innocence.
>
> The employed attorney's file consisted of a manila folder with petitioner's name on it. Inside the folder was a single sheet of paper which was blank except for the following: "Defendant, Thaddeus King, fee, $300.00." The only other notation on the file was the notation "10-9-66, Closed" which was initialed by the "trial attorney." The record is absolutely bare of any evidence of any work actually done in connection with petitioner's case. (305 F. Supp. 636, 638).

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him: to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States of America provides, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indubitably, unquestionably, and unequivocally, it should not be doubted that a warm body with a law license is insufficient. An attorney at law, if he is either court appointed or retained, has a duty, once he undertakes to represent an accused person or otherwise, to himself, his profession and his client to represent that client with zeal, confidence and intelligence. To go through the motions of representation is the antithesis of what is expected of competent, adequate and effective counsel.

Undoubtedly, to deny this application for certiorari or to grant this application for certiorari and affirm Respondent's position will bring about challenges by convicted persons on the competency of their trial counsel. However, are members of the Bar so weak that we fear such accusation if we have nothing to fear? It is submitted that if an attorney has been conscientious and honest, put forth his client's case with enthusiasm, made every effort to protect his client's rights, and has done everything conceivable to give his client his day in court, that, if challenged, it will be the client, not the attorney, who will be the worse for wear. It is respectfully submitted that if the attorney has done the above he has nothing to fear from a dissatisfied client. If he has not manifested the activities promulgating in effective assistance, then

he has only himself to blame. Cf. *Henderson v. Cardwell*, Sixth Circuit, 426 F.2d 150.

The State of Texas said on page 20 of it's Petition:

> In this situation, it is fair to say that Respondent is presumed to have acquiesced in all of his lawyer's activities unless he notified the court to the contrary. In view of the fact that Respondent has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than the indigent defendant for his appointed counsel.

This reasoning is questionable, to say the least. How is a layman, unlearned in the law, with no showing of familiarity with courtroom procedures and techniques (except to appear in court to plead guilty on one (1) case) supposed to know when to tell his attorney when to object, when not to object, when to ask questions and when not to ask questions. The client puts his faith in the lawyer to do his job.

Counsel for Respondent cannot better put the issue than District Judge Roberts did in *Breedlove v. Beto*, 404 F.2d 1019, wherein he said:

> "One of the appellant's other points, which we will not decide because the Jackson v. Denno point is dispositive, is that his retained attorney was so ineffective as to amount to an unconstitutional denial of counsel. The State's reply to this contention was that this issue can arise only when the attorney is appointed by the Court.
>
> "The majority of decisions have drawn no distinction between retained counsel and appointed counsel in the consideration of the adequacy-of-counsel question.

See e.g., Wilson v. Rose, 9th Cir. 1966, 366 F.2d 611, 615; Craig v. United States, 6th Cir. 1954, 217 F.2d 355, 358-359; Abraham v. State, 1950, 228 Ind. 179, 91 N.E.2d 358, 361. The writers on the question of inadequate counsel unanimously condemn any attempt to block inquiry into the adequacy of retained counsel. See Craig, The Right To Adequate Representation in the Criminal Process: Some Observations, 1968, 22 Sw. L. J. 260, 272; Note 78 Harv. L. Rev. 1434, 1965; Note 49 Va. L. Rev. 1531, 1963. These authorities conclude that the test should not be whether the state denied the effective assistance of counsel, but whether defendant was denied a fair trial because he did not have effective representation.

"The minority viewpoint, urged by the State in this case, is that no unconstitutional denial of effective counsel can occur unless State officials outwardly prevent the privately retained counsel from performing his duties.

"The first argument for this viewpoint is that since there is no state action, there can be no denial of the Fourteenth Amendment right to a fair trial. However, the majority viewpoint's reply is that in light of the rationale of Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, which held that the state participation in an unconstitutional activity was sufficient state action to invoke the Fourteenth Amendment, this argument cannot stand because if there was in fact incompetent counsel under the standards for appointed counsel, the state's participation in the trial which was fundamentally unfair because of the incompetent retained counsel is sufficient state action. See generally, Williams, The Twilight of State Action, 1962, 41 Texas L. Rev. 347. The second rationale of the minority viewpoint is that since defendant selected the lawyer, he is presumed to acquiesce in all of his attorney's activities.

> Yet, the majority's reply is that the basis of the Gideon requirement—that a man is not competent to represent himself at a criminal trial—seems to require the conclusion that he is incompetent to evaluate accurately the ability of his lawyer before the trial or the quality of representation at the trial. Although the test for whether there was unconstitutionally ineffective counsel is clear, see Williams v. Beto, 5th Cir. 1967, 386 F.2d 16, the Fifth Circuit's position is in doubt on this issue of whether the inquiry is limited to appointed counsel and not retained counsel. In a recent per curiam opinion, the minority viewpoint appears to be espoused. Howard v. Beto, 5th Cir. 1968, 375 F.2d 441, 442. However, in another Fifth Circuit opinion, Judge Brown articulates the majority viewpoint. Porter v. United States 5th Cir. 1962, 298 F.2d 416, 463."

In *Scott v. United States*, District of Columbia Circuit, 1970, 427 F.2d 609, that Honorable Court pointed out:

> . . . the issue is whether counsel's assistance was so inadequate as to make the trial a farce and a mockery. That standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness. Bruce v. United States, 126 U.S. App. D.C. 336, 339, 379 F.2d 113, 1136 (1967). The "farce and mockery" standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) with Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The appropriate standard for ineffective assistance of counsel, as set forth in Bruce, supra,

is whether gross incompetence blotted out the essence of a substantial defense. (610).

It should be understood that not every mistake of judgment or misconception of the law renders an attorney incompetent or ineffective or inadequate. However, most jurisdictions refer to the mockery principle. Further, ineffective assistance cannot be predicated upon some isolated act or omission. See *Holnagel v. Kropp*, Sixth Circuit, 426 F.2d 777, and *United States v. Phillips*, Second Circuit, 426 F.2d 1069.

Mere failure to make objections is not sufficient to establish incompetence of counsel. *Henderson v. Cardwell*, 425 F.2d 181, supra.

Failure to subpoenae a witness is not sufficient. *United States v. Grimes*, Fifth Circuit, 426 F.2d 706, and *Fitts v. United States*, Fifth Circuit, 406 F.2d 518.

If there is a possible conflict of interest between two (2) defendants and one or both makes an intelligent and intentional waiver of severance, then one or both cannot later complain. *Larry Buffalo Chief v. South Dakota*, Eighth Circuit, 425 F.2d 271.

Mere failure to achieve acquittal is insufficient. *United States v. Hammonds*, United States Court of Appeals, D.C. Circuit, 425 D.2d 597. However in Hammonds, *Ibid.*, the defendant was held to be denied the effective assistance of counsel by virtue of the totality of the omissions and errors, and particularly the futile closing argument. The Court's attention is directed to the discussion of rules concerning the issue of ineffective assistance of counsel. (600-602). Cf. *United States v. Katz*, Second Circuit, 425 F.2d 929.

Judge Rives of the Fifth Circuit in *United States v. Mancuso*, 423 F.2d 23, said that the "perfunctory, bad faith, sham, pretense, lack of conference and preparation," standard should be discarded and a stricter standard should be enunciated regarding competence of counsel.

"Effectiveness of counsel is not tested merely by counsel's performance in the courtroom but must also be measured by the attorney's familiarity with the facts and the law of the case." *Hollingshead v. Wainwright*, Fifth Circuit, 423 F.2d 1059.

The Fifth Circuit reversed a court appointed situation in *Windom v. Cook*, 423 F.2d 721, where is was shown that counsel had only one brief interview with the defendant; at which time counsel did not discuss the elements of the crimes, did not make any effort to find out the facts of the case, and did not attack the composition of the grand jury.

Further, it is not the method used in obtaining counsel, the time spent, and the possibilities of unused defenses which count regarding pleas of guilty which will render counsel ineffective. See *Lamb v. Beto*, Fifth Circuit, 423 F.2d 85.

In a *Glasser*, supra, situation, the Fifth Circuit in *Baker v. Wainwright*, 422 F.2d 145, reversed for deprivation of effective assistance of counsel where the same attorney represented two co-defendants. Cf. *Walker v. United States*, Third Circuit, 422 F.2d 375; *United States v. Lovano*, Second Circuit, 420 F.2d 769, and *United States v. Cale*, Sixth Circuit, 419 F.2d 897

See also *White v. United States*, 5th Circuit, 396 F.2d 282. In an unusual situation regarding the issue of in-

effective assistance of counsel, the Seventh Circuit, in *Johnson v. United States*, 422 F.2d 555, not being able to determine whether the defendant was challenging the effectiveness of his trial counsel, but of counsel who failed to file a bill of exception, denied relief.

In *Caraway v. Beto*, Fifth Circuit, 421 F.2d 636, a court appointed attorney was held ineffective where he visited the defendant only once three days before trial and this conference lasted just fifteen minutes, but the conference did not involve a discussion of possible defenses nor the advisability of pleading guilty. No information was sought concerning witnesses and no attempt was made to interview any witnesses.

No objection was made to exhibits offered into evidence. Further, evidence of an extraneous offense was admitted.

In *Harris v. Dees*, Fifth Circuit, 412 F.2d 1079, in answer to the challenge of competency, the Court answered step by step the objections to counsel's activities.

In one of the few cases involving the challenge of ineffective assistance of counsel on appeal, the Court's attention is directed to *U. S. v. Johnson*, Ninth Circuit, 412 F.2d 1342. After discussing the issues, the Court held that the contentions urged were not arguable and were therefore frivolous.

In the realm of representing co-defendants, the best stated rule regarding ineffective assistance of counsel where this occurs is as follows:

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been

denied the effective assistance of counsel. *U. S. v. Lorano*, Second Circuit, 420 F.2d 769. (773).

In *Kelly v. Peyton, Fourth Circuit*, 420 F.2d 912, it was pointed out that the magistrate who signs the warrants for a defendant's arrest may not later represent him in Court. Thus, if an attorney has a conflicting interest, he cannot act with that degree of loyalty which effective representation requires. The interesting facet of *Kelley, Ibid.*, is that the first issue was discussed under the issue of *depriviation* of the effective assistance of counsel whereas the failure of the attorney to consult with the client fell within the realm of *ineffective* representation.

The Sixth Circuit, as pointed out in *Kelley, Ibid.*, also follows the non-distinction between retained and appointed counsel. (914).

The District of Columbia Circuit, in *Spriggs v. Wilson*, 419 F.2d 831, where a trial judge, in his chambers, after reviewing a draft classification file, decided there was a basis for the classification and then granted the defendant a continuance, held the expeditious manner of trying the case denied the defendant effective assistance of counsel.

"Lack of diligence in discovering evidence which was not used at the trial is not necessarily to be equated with ineffective assistance of counsel." Quoted from *Opie v. Meacham, Tenth Circuit*, 419 F.2d 465. However, the newly discovered evidence would have impeached or contradicted some of the witnesses who testified.

The necessity of showing of injury is well put by the Fifth Circuit in *United States v. Long*, 419 F.2d 91. Two days before trial counsel notified the court he had been retained. Prior thereto, the defendant had other retained

counsel who never officially withdrew from the case. A motion for continuance was overruled. It appears there was no showing of what a continuance would have accomplished was made; thus, no ineffective assistance of counsel. See also *United States v. Valdez*, Fifth Circuit, 418 F.2d 363.

Where the evidence is overwhelming as to the guilt of the accused, his chance of upsetting a conviction on the ground of ineffective assistance of counsel is slim where he makes claims his attorney did this or did not do that during the trial. See *Whitsell v. Perini*, Sixth Circuit, 419 F.2d 95. However, what about the sentencing and punishment phases? In other words, when does the trial attorney's function cease as to being adequate and effective for his client?

The distinction between a direct appeal attack and a collateral attack, in the realm of ineffective assistance of counsel, is, of course, always present. See *Heard v. United States*, District of Columbia Circuit, 419 F.2d 682.

The mere fact that counsel is absent during part of the trial is insufficient, in itself, to sustain ineffective assistance of counsel. However, in *Henderson v. United States*, Fifth Circuit, 419 F.2d 1277, it was emphasized that nothing harmful occurred to the accused.

In the area of *Massiah v. United States*, 377 United States 201, 84 S.Ct. 1926, 18 L.Ed. 2d 246, and *Wade v. United States*, 386 United States, 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149, it was held in *Schantz v. Eyman*, Ninth Circuit, 418 F.2d 11, that the defendant was denied the assistance of counsel where, in a post-indictment situation, the county attorney sent a psychiatrist to the home

of the defendant, requested an interview for the purpose of making a psychiatric examination, was refused and then proved at the trial this refusal.

An accused who lays the groundwork for later claiming ineffective assistance of counsel gets no relief from the courts. In *Cohen v. Wainwright*, Fifth Circuit, 418 F.2d 565, the defendant on the date of the trial, told the court that his attorney of record was not really his trial attorney but his writ of habeas corpus attorney. The court held there was no error in putting the defendant to trial without granting a continuance. The "writ of habeas corpus attorney" became the trial attorney. See also *United States v. Johnson and Bradley*, Fifth Circuit, 417 F.2d 332, where the defendants discharged retained counsel, asked for and received court appointed counsel, and then asked for and received a one day continuance.

Even though it may not be difficult to conceive of bizarre factual situations involving an attorney-client relationship, one of the best is shown by *Wilson v. Phend*, Seventh Circuit, 417 F.2d 1197. There the retained attorney was also the owner, editor and publisher of a daily newspaper distributed throughout the county. The particular case for which that defendant was tried apparently received a great deal of publicity; in *his* attorney's newspaper as well as others, with little of the publicity being advantageous to the accused. There was little communication between the parties prior to trial; no motions for change of venue or continuance were made and the attorney did not pursue leads for witnesses or evidence furnished by the accused. After trial, things did not change much. No motion for new trial was filed. The Seventh Circuit, Judge Cummings speaking for the Court, unanimously held:

> These assumed facts, taken together, are clearly sufficient to indicate that defendant was convicted without the benefit of effective counsel, as required by the Sixth and Fourteenth Amendments to the United States Constitution. (1199).

In discussing the fact there is no distinction between retained and court appointed counsel, the Court further said:

> In our decision in Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957), we held that self-retained counsel may be so inadequate and incompetent as to deprive the accused of representation and reduce the trial to a shame in deprivation of his rights to due process of law. . .
>
> The distinction between retained and appointed counsel overlooks the fact that, in either case, the State has obtained a conviction against the accused under such grossly unfair circumstances as to cast doubt upon the factual basis upon which proof of guilt rests. We agree with other courts which have held that in such circumstances sufficient state action exists to invoke the protections of the Fourteenth Amendment. Wilson v. Rose, 366 F.2d 611, 615-616 (9th Cir. 1966): Whitaker v. Warden, 362 F.2d 838, 841 (4th Cir. 1966); Jones v. Huff, 80 United States App. D.C. 254, 152 F.2d 14, 15-16 (1945); Porter v. United States, 298 F.2d 643, 463, 464 (5th Cir. 1962). (1200).

A failure of the trial attorney to make and file a motion to suppress evidence where such action is a reasonable trial tactic is not grounds to complain. *U. S. v. Meyer*, Eighth Cir., 417 F.2d 1021.

Innocuous comments by the trial judge to the defense attorney are insufficient to complain. *U. S. v. Johnson*, Fifth Circuit, 417 F.2d 332.

The Ninth Cireuit, in *Gairson v. Cupp*, 415 F.2d 352, held that failure of the defendant's retained counsel to advise the defendant of his right to appeal his conviction deprived the defendant of his constitutional right to effective trial counsel. Citing *Gideon*, supra, as authority, the Court said:

> Appellant was entitled to effective representation by counsel during his trial as a matter of constitutional right . . . He is also entitled to counsel on appeal . . . Trial counsel does not have an obligation to represent his client on appeal. But when trial counsel knows that his client is not represented by appellate counsel, knows that his client is indigent, knows that his client is not represented by appellate counsel, and knows that his client is ignorant of the availability of an indigent appeal and of the procedure for instituting such an appeal, the trial attorney has an affirmative duty to protect his client's right to appeal by filing a notice of appeal, or by telling his client how the client can proceed on his own behalf. A trial attorney who has failed to perform that duty has ineffectively represented his client . . . The failure of appellant's right to appeal resulted in a deprivation of the assistance of effective trial counsel. (Cf. United States ex rel. Maselli v. Reincke (2d Cir. 1967) 383 F.2d 129; Wynn v. Page (10th Cir. 1966) 369 F.2d 930; see Doyle v. United States (9th Cir. 1966) 366 F.2d 394, at 398-399) (353-354). Leventhal v. Govin, 1st Circuit, 396 F.2d 441. See also Byrd v. Smith, Fifth Circuit, 407 F.2d 363; Atilus v. United States, Fifth Circuit, 406 F.2d 694. See also Turner v. North Carolina, Fourth Circuit, 412 F.2d 486.

Can an individual defendant who voluntarily and intelligently waives the right to licensed counsel, nevertheless, challenge his own ineffectiveness of the assitance of counsel where he represents himself? See *Arnold v. United States*, Ninth Circuit, 414 F.2d 1064. There, the "layman-attorney" claimed that his refusal of an offer to dismiss a count of the indictment involving the death penalty would have, if he had been a licensed attorney, been grounds for disbarment as incompetent to further practice law. The Court said "Not so" as "Errors of judgment exemplify neither incompetent nor inadequate representation." (1060). See also *Osborne v. United States*, 4th Circuit 371 F.2d 912 (923).

Although it is recognized that an accused has the right to counsel at every stage where assistance of counsel is critical, the fact that one does not have counsel at a particular proceeding or stage does not vitiate his conviction unless he was prejudiced. *United States v. Murphy*, Sixth Circuit, 413 F.2d 1129.

Even where trial counsel confesses unfamiliarity and lack of preparation, if the record reveals otherwise, there is no denial of effective assistance of counsel. *United States v. Marine*, Seventh Circuit, 413 F.2d 214.

Also, where the attorney overcooperates, he is likely to be challenged, if the client is convicted. However, the client or ex-client runs into the gauntlet of the presumption of competency, whether retained or court appointed.

> In *Kress v. United States*, 411 F.2d 16 (8 Cir. 1969), this court very recently affirmed old and established principles by stating that there is a presumption of competency of court appointed counsel; that the requirement of the Sixth Amendments is met when-

> ever the accused is supplied with counsel who exercises the judgment expected of one trained in the law and committed to the diligent application of its principles; and that a petitioner will prevail on this issue only if it can be said that what the attorney did or did not do made the proceedings a mockery and shocking to the conscience of the court. Slawek v. United States, Eighth Circuit, 413 F.2d 957. (959).

Also, if a defendant enters a plea of guilty, his later wishful thinking will get him little relief. See *Cantrell v. United States*, Eighth Circuit, 413 F.2d 629.

Lack of rapport between an accused and his court appointed counsel will generally not rise to the level of a claim of deprivation of a constitutional right. See *Lamoreux v. Massachusetts*, First Circuit, 412 F.2d 710; *Shaw v. Uniter States*, Eighth Circuit, 403 F.2d 528, cf. *U. S. v. Rundle*, Third Circuit, 394 F.2d 748.

Again, the lack of preparation or allowance of time for preparation goes to injury. How was the accused injured? Merely because his attorney was appointed two (2) days before trial, in itself, is insufficient to sustain ineffective assistance of counsel. See *Foster v. Beto*, Fifth Circuit, 412 F.2d 892, and *U. S. v. Sisk*, Sixth Circuit, 411 F.2d 1192.

The Courts will not ordinarily second guess an attorney's cross examination, even if it could have been more exhaustive. See *United States v. Pearce*, Fourth Circuit, 412 F.2d 895.

The fact that an attorney presents too many defenses goes to trial strategy and is not grounds for ineffective assistance of counsel. *Wright v. Craven*, Ninth Circuit, 412 F.2d 915.

A conflict of interest allegation may afford an accused relief. In *Zurita v. U. S., Seventh Circuit,* 410 F.2d 477, where the accused had retained counsel at trial and then retained counsel was appointed on the appeal, it was pointed out that where the attorney had business dealings with the robbed bank, this, in itself, called for an evidentiary hearing. See also *Goitia v. U. S.,* First Circuit, 409 F.2d 524.

The Ninth Circuit, in determining the incompetency or ineffectiveness of counsel, uses the perfunctory, bad faith, sham, pretense, farce, mockery, shocking to the court's conscience, and lack of opportunity for conference and preparation standard as enunciated in *Williams v. Beto,* Fifth Circuit, 354 F.2d 698. See *Borchert v. U. S.,* Ninth Circuit, 405 F.2d 735.

Ordinarily, a client is bound by his attorney's actions. Cf. *Brookhart v. Janis,* 86 S.Ct. 1245, and *Henry v. Mississippi,* 85 S.Ct. 564.

The issue of adequacy of counsel and effective assistance of counsel regarding juvenile proceedings is seen in *Haziel v. U. S.,* U.S.C.A., D.C., 404 F.2d 1275.

A unique theory case, without obtaining any relief, is *U. S. v. Rubio,* Seventh Circuit, 404 F.2d 678, where the defendant was charged with a narcotics violation. At the time of his arrest, a sizeable sum of money was seized. The Defendant contended that by failure of the Government to return all or part of the money (the Government eventually returned $1,000.00) deprived him of the effective assistance of counsel. The Defendant failed because the failure, alone, to return the money did not raise a constitutional violation. No prejudice was shown to have resulted to the defendant.

The Ninth Circuit, as shown by *Andrews v. U. S.*, 403 F.2d 341, which does not use the farce or mockery test but simply whether the representation fell below minimum constitutional standards, held, from the face of the record, that counsel's defaults rendered him ineffective.

The fact that a defendant's hearing aid battery runs down will not result in his being denied the effective assistance of counsel unless objections are made and the record shows that the defendant could not hear or had difficulty in hearing. See *Guillory v. Wilson*, Ninth Circuit, 402 F.2d 34.

The Fifth Circuit has used the farce and mockery of justice standard for many years. However, it also uses the denial of fundamental fairness test. See *Campbell v. U. S.*, Fifth Circuit, 401 F.2d 894.

So called "nit-picking" and finding commissions and omissions of trial counsel usually do not sustain the challenge of ineffective assistance of counsel. See *Tanner v. U. S.*, Eighth Circuit, 401 F.2d 281.

Failure to file a motion for new trial is generally not grounds for error as being denied effective assistance of counsel. *Hooper v. Swenson*, Eighth Circuit, 401 F.2d 352.

A rather interesting case involving individuals who were not indigent and desired to retain their own counsel, but who could not make up their minds and how their ingenuousness prolonged their cases is *Bostick v. U. S.*, Fifth Circuit, 400 F.2d 449; Cert. Denied, 89 S.Ct. 725. See also *U. S. v. Stahl*, Seventh Circuit, 393 F.2d 101.

The fact that the trial judge was on the trial attorney's disciplinary committee concerning unethical behavior in

conducting the defendant's defense did not deprive the defendant of the effective assistance of counsel. *U. S. v. Cook*, Fourth Circuit, 400 F.2d 877.

A troublesome area of the Sixth Amendment will, undoubtedly, extend to the bilateral versus unilateral activities of trial counsel in making objections, failing to make objections and, in general, conducting the trial strategy of a criminal case. See *Mize v. Crouse*, Tenth Circuit, 399 F.2d 593.

A defendant has a rough road to hoe if he has pled guilty and later wishes to challenge the effectiveness of his counsel. See *White v. Beto*, Fifth Circuit, 399 F.2d 302, and *Reeves v. Wilson*, Ninth Circuit, 395 F.2d 435.

In a factual situation involving several interesting facets to the issue at Bar, the Court's attention is directed to *Marxuach v. U. S.*, First Circuit, 398 F.2d 548. There, one attorney started out representing both defendants. Thereafter, a second attorney entered as co-counsel. On the day the jury was ordered to be empanelled, one of the defendants failed to appear because of illness. On the same day, a bomb was discovered in an automobile of a government witness. When the court inquired if the defendants' attorneys knew anything about it, one of the attorney's (the second) had to be hospitalized. Thereafter, the trial court overruled a motion for continuance and tried the co-defendant who had also absented himself and was located in a hospital, and was brought to court by a marshal. The attorney who went to trial testified that he had "inconvenience" with the English language and was unfamiliar with the Federal rules. It appears that from the record this attorney was easier to understand than the first attorney and also showed the attorney had more than an ade-

quate command of the English language. The Court found no error.

Failure to elicit testimony of an exculpatory nature while a defendant is on the stand will not render a trial a farce. "There must be some showing that such evidence was available at the trial." (800) *Sanchez v. U. S.*, Ninth Circuit, 398 F.2d 799.

Many times, an attorney's inadvertance will cause him to be held ineffective. This was shown in *Calloway v. Powell*, Fifth Circuit, 393 F.2d 886, opinion by Circuit Judge Godbold, where an attorney was appointed orally to appear at a preliminary hearing. When the attorney showed up, the defendant, probably unknown to the attorney, through his family, had not one but two retained attorneys. When the arraignment was set, appointed counsel was notified to appear in Court. The appointed counsel made the mistake by continuing on the case and eventually inducing the defendant to plead guilty. Judge Godbold said:

> This case is another instance of the hiatus which arises at times between counsel thought to be retained, or retained and not paid, or retained for a limited purpose, and the appointed counsel. The frequency of the hiatus can be ameliorated by clear and definite requirements for entry of appearances as counsel of record and for withdrawal of appearances only with leave of court, by appointments of counsel terminable only on requests of record and with leave of court, and by requests for continuances by appointed attorneys who find that because of misunderstanding as to who is representing the accused they are not prepared to furnish representation meeting constitutional requirements. Short of waiver or

fault of the defendant, neither of which is proved in this case, confusion among attorneys about who is to represent the criminal defendant cannot erode away his right to effective counsel.

The counsel here furnished did not meet constitutional standards. The right to counsel is the right to effective counsel. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). This Court has interpreted counsel to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). Effective counsel includes familiarity of counsel with the case and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his options. Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967); Roberts v. Dutton, 368 F.2d 465 (5th Cir. 1966); see Collingsworth v. Mayo, 173 F.2d 695 (5th Cir. 1949). An accused represented by appointed counsel has a right to expect a measure of devotion to his cause at least equal to that expected from retained counsel of the accused's own choosing. Johnson v. U. S., 328 F.2d 605 (5th Cir. 1964). Under the circumstances revealed by this record it is apparent that appointed counsel, surprised by being called to the arraignment and having only a brief conference with the accused in the courtroom, did not measure up to constitutional requirements. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). The absence of constitutional standards is underscored by the defendant's felt necessity to seek the advice of the sheriff's department investigator before entering his plea.

Merely because a defendant claims his attorney did not interview and call certain witnesses is insufficient

unless it is shown what materiality they would have added to the case. See *Bush v. U. S.*, Ninth Circuit, 393 F.2d 478.

In *Cross v. U. S.*, Eighth Circuit, 392 F.2d 360, it was held that in light of defense counsel's statement to the trial court that his willful neglect of duty resulted in the defendant's case not being investigated or developed called for an evidentiary hearing. Both the defendant and the attorney got hearings in this case.

Chief Justice Burger, in *Harried v. U. S.*, D.C. C.A., 389 F.2d 281, where the defendant had retained counsel, discussed the issues raised in that case concerning the charge of ineffective assistance of counsel revolving around trial strategy and tactics. However, the Court dissected each of the grounds raised to show that ineffective assistance of counsel was not sustained by the facts.

Interesting dicta that the charge of ineffective assistance of counsel constitutes an occupational hazard of defending certain cases is found in *Smith v. U. S.*, Ninth Circuit, 389 F.2d 564.

Failure to ask for a change of venue is, by itself, insufficient to support a charge of ineffective assistance of counsel. *Morton v. Henderson, Sixth Circuit*, 389 F.2d 699.

The homemade version of a public defender system was taken to task in *Coles v. Peyton*, Fourth Circuit, 389 F.2d 224. The dissenting opinion felt differently about the merits of the charge of ineffective assistance of counsel than did the majority of the Court. However, Circuit Judge Winter's statements, in a clear and orderly fashion

regarding what is expected of counsel, contain more of "things" to do in order to satisfy the requirement of effective and adequate assistance of counsel.

> Included among the things that counsel admitted they did not do are the following: Counsel made no investigation of the reputation of the prosecutrix for chastity. Counsel made no attempt to determine the identity of, or to interview the prosecutrix's male companion. Counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be. Counsel did not explain the elements of the crime of forcible rape to petitioner, including the necessity of proof of penetration, and question him in regard thereto. In short, counsel did no more than interview petitioner on the three occasions previously alluded to and to accept the statements he made to them during the interview. Counsel were unequivocal that they did not know that the prosecutrix had been examined medically and that they had no knowledge of the written, signed medical report.
>
> To support our conclusion that petitioner is entitled to a writ of habeas corpus, we need look only to the principles to be distilled from Twiford v. Peyton, 372 F.2d 670 (4 Cir. 1967); Martin v. Commonwealth of Virginia, 365 F.2d 549 (4 Cir. 1966); Braxton v. Peyton, 365 F.2d 563 (4 Cir. 1966); and earlier authorities, and apply them to the facts of this case. The principles may be simply stated: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable.

Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

Although counsel for petitioner were appointed over three weeks prior to trial, the delay of almost three months in their appointment and the fact that they were appointed to represent such a great number of other defendants to be tried at a forthcoming term of court constitutes a colorable fact. Perhaps the burden of representing so many persons accused of felonies explains the woefully inadequate services rendered to petitioner. Whatever the reason, the services of counsel were ineffective in at least several regards.

The record is clear that counsel did not explain the elements of the crime of rape to petitioner, especially the element of penetration. If the recollection of one of petitioner's counsel was accurate that petitioner was "trying" to have intercourse with the prosecutrix, penetration may not have occurred, in which event, under Virginia law the substantive crime would not have been committed. McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540 (1951). Effective representation of counsel would require exploration of this possibility under the facts of the case.

Virginia law also interposes consent as an absolute bar to a prosecution for rape when the alleged victim is over the age of consent, and previous want of chastity is relevant and probative evidence of consent. Bailey v. Commonwealth, 82 Va. 107 (1886); Va. Code Ann. § 18.1-44 (1960 Repl.

> Vol.). Even if counsel were satisfied that lack of penetration was unavailable as a defense, effective representation would require some investigation of the reputation of the prosecutrix for chastity under the facts of this case, especially when petitioner's version of the incident, as understood by both of his counsel, was that he had an encounter with a common street walker. Effective representation would similarly require some investigation to determine the identity of, and some attempt to interview, the male companion of the prosecutrix and some attempt to interview Carrie Herbert to ascertain if evidence to support a defense of consent could be uncovered. Similarly, some inquiry should have been made to ascertain if the prosecutrix were medically examined, not only because the report which was in existence would be proof supporting a lack of penetration, but also because the report disclosed the identity of the medical examiners from whom inquiry could be made as to whether their examination disclosed the presence or absence of signs of physical violence on the person of the prosecutrix with its direct relevance to the question of consent.

Merely by cumulating errors of trial counsel will not get any relief unless one can show where a different result would have altered the end result. See *Speer and McCrea*, Ninth Circuit, 388 F.2d 110.

However, even though in making a determination of whether an attorney was or was not effective, adequate or competent, constitutes second guessing, most courts shy away from the term or phrase "second guessing." Again, it is not what the attorney did or did not do which will result in the attorney being held ineffective, but whether what he did or did not do constituted substantial prejudice to the defendant. See *U. S. v. Meek*, Seventh Circuit, 388 F.2d 936.

As seen above, it is usually the dissent who sees the case differently from the majority opinion as to holding an attorney to have been ineffective. The reverse of this was seen in *Daugherty v. Beto*, Fifth Circuit, 388 F.2d 810. Circuit Judge Rives felt that at least part of the standard of effective assistance of counsel should be the same whether the defendant had retained or court appointed counsel. If an attorney had a court appointed client he is entitled to the same type of representation expected of an attorney with a well heeled client.

Many times, it is the omission of disclosure to the client which will get the attorney in hot water. However, most courts follow the "exceptional circumstances" rule that the client is bound by the omissions of his attorney; such as the stipulation of evidence and waiver of confrontation of witnesses. See *Poole v. Fitzharris*, Ninth Circuit, 396 F.2d 544.

The Fifth Circuit has also discarded the time factor as controlling. As Circuit Judge Coleman said in *Doughty v. Beto*, Fifth Circuit, 396 F.2d 128:

> When the proof shows that a defendant is fully informed of his rights, admits his guilt, and is relieved of the likelihood of a life sentence, we cannot condemn the efforts of an attorney as being ineffective. The time spent is only one of the elements to be considered and the totality of the facts may not be over-ridden by a judicial stop watch. (130).

It is not unusual for judges, as well as attorneys, to look at a record and reach a different conclusion regarding competency or effective assistance of counsel. In *Vizcarra-Delgadillo v. U. S.*, Ninth Circuit, 395 F.2d 70, the majority of the Court gave defense counsel a pat on

the back. The minority, concluding that counsel's efforts were directed at achieving a legally impossible result because of counsel's erroneous interpretation of the law, took counsel to task on his lack of knowledge of the law; the course of pursuit; the lack of investigation; and the lack of information conveyed to the defendant regarding the consequences of his plea. Circuit Judge Browning's statement, in essence that it is not how you played the game yesterday, but how you play today which is what counts, is appropros to many cases:

> The question is not whether appellant's counsel was qualified by training and experience to render effective legal assistance to appellant, but whether he did so. Brubaker v. Dickson, 310 F.2d, supra at 37. The record demonstrates that he did not. (74). See also Coles v. Peyton, 4th Circuit, 389 F.2d 224.

A trial judge, by overstepping his bounds of propriety in commenting upon the evidence and in lengthily and partisanly interrogating witnesses in the presence of the jury may result in depriving a defendant of his right to an impartial trial such as to deprive him of effective assistance of counsel. See *Bursten v. U. S.*, Fifth Circuit, 395 F.2d 976.

What is the effect on a defendant if he is represented by an attorney-imposter? His conviction is void and the subsequent use at a new trial of evidence presented during the void trial will entitle him to a new trial. See *Harrison v. U. S.*, D.C. C.A., 387 F.2d 203.

The fact that trial counsel had previously defended the government's informer and main witness will not, standing alone, gain a defendant relief. See *Harrison v. U. S.*, Fifth Circuit, 387 F.2d 614.

Circuit Judge Jameson of the Ninth Circuit in *Benson v. State Board of Parole & Probation, et al.*, 384 F.2d 238, said that counsel's "inability to make a silk purse out of a sow's ear ought not reflect on their competency" (241).

In *U. S. v. Reinecke*, Second Circuit, 383 F.2d 129, in discussing the distinction between tactical or strategic errors and failure to show any prejudicial errors, Circuit Judge Waterman, writing in answer to the State's contention that unless it is shown that counsel's incompetency is attributable to the State a defendant may not complain, said:

> Nevertheless, the State contends that collateral relief from a state conviction may not be had unless counsel's incompetency may be attributed to the State, citing Farrell v. Lanagan, 166 F.2d 845 (1 Cir.), cert. denied, 334 U.S. 853, 68 S.Ct. 1509, 92 L.Ed. 1775 (1948). Such incompetency, it is urged, must be of the sort of which the trial court may take cognizance and which it has a duty to correct. It cannot be gainsaid that this position has its proponents. See, e.g., Davis v. Bomar, 344 F.2d 84 (6 Cir.), cert. denied, 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965); see U.S. ex rel. Darcy v. Handy, 203 F.2d 407, 427 (3 Cir. 1953). Other courts, however, have more wisely focused their attention on the merits of each claim of incompetency of counsel, see, e.g., U.S. ex rel. Fazio v. Fay, supra; U.S. v. Garguilo, supra; Snead v. Smyth, 273 F.2d 838 (4 Cir. 1959); Riddle v. McLeod, 240 F.2d 206 (10 Cir. 1957), thereby insuring that each defendant has received the fundamental fairness required by the Fourteenth Amendment. While it is clear that certain acts of incompetency may occur in the presence of and be obvious to the trial court,

see, e.g., U.S. ex rel. Darcy v. Handy, supra, it is equally clear that many forms of ineffective assistance of counsel will not, as here, be readily apparent to the trial court. Note, Effective Assistance of Counsel, 49 Va. L. Rev. 1531, 1554 (1963). It is no answer to presume that an accused defendant acquiesces in the errors of his retained counsel unless he notifies the trial court that he is not acquescing therein; the average defendant would be unlikely to discover his lawyer's inadequacies until it is too late to notify the court. 49 Va. L. Rev. at 1555. Here, for example, Maselli was unaware that his right to take an indigent appeal had been lost by Piccolo's inaction until it was too late to advise the trial court; thereafter his subsequent requests for permission to appeal and for the assistance of appellate counsel were denied by the state courts.

The State tells us that relieving defendants of responsibility for the sort of misconduct of their chosen counsel which transpired here will invariably "* * * put a premium on incompetent and inefficient counsel whose mistakes could be more certainly relied upon as effective aid for reversal than the sound and competent advice and trial conduct of the most efficient counsel". Popeko v. U.S., 294 F.2d 168, 171 (5 Cir. 1961). We do not share this belief. As we have already observed, relator does not suffer here from counsel's tactical or strategic errors, the detection of which would impose upon the courts the intolerable burden of inquiring into counsel's designs at every stage in the proceeding, see 49 Va. L. Rev. at 1554. And, while overzealous counsel might occasionally commit deliberate errors with the express or implied consent of his client, see, e.g., People v. DeSimone, 9 Ill.2d 522, 138 N.E.2d 556 (1956), such cases will be rare, 49 Va. L. Rev. at 1541, and should be treated on their own facts. Here, counsel's post-trial conduct contrary to his client's wishes is not attrib-

> utable to the accused, who was unconscionably prejudiced thereby. Fundamental fairness requires that he be granted the rights which were lost to him through no fault of his own.
>
> Moreover, to hold otherwise would result in invidious discrimination against indigent defendants. As "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has' ", Douglas v. State of California, 372 U.S. 353, 355, 83 S.Ct. 814, 816, 9 L.Ed.2d 811 (1963), quoting from Griffin v. People of State of Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956), we must seek to "assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." Anders v. State of California, 386 U.S. 738, 745, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). Here, it is clear that the loss of Maselli's appellate rights, rights so useful to his codefendant Reid, was occasioned by his indigency as well as by his counsel's incompetency. Had he been financially able to employ private counsel on appeal Maselli would most assuredly have followed Piccolo's inadequate advice to seek an appellate specialist and might even have induced Piccolo to handle the appeal. This is precisely the situation in which the Supreme Court has suggested that the Fourteenth Amendment requires a State to grant relief. See Norvell v. State of Illinois, 373 U.S. 420, 422-423, 83 S.Ct. 1366, 10 L.Ed.2d 456 (1963).

Chief Judge Haynesworth in *Stevens v. Warden,* Maryland Penitentiary, Fourth Circuit, 382 F.2d 429, sympathized with the defendant as to the sentence he received and felt it was harsh and uncalled for under the facts of

the case, but felt the Federal Court was powerless to afford relief. The Eighth Amendment was not discussed. However, Judge Haynesworth did answer each of the defendant's allegations concerning his charge of incompetency of trial counsel.

Of course, it appears, at least on the surface, that some Circuit Courts require more of an attorney than others. Circuit Judge Rives in *Brooks v. Texas*, Fifth Circuit, 381 F.2d 619, stated that "This Circuit has been strict in its requirement of the effective assistance of counsel" (624). There, the attorney was held ineffective because he failed to make objections and failed to make adequate preparation, among other things.

Inadequate representation due to overwhelming amount of work in public defender's office. See *Lewis v. Henderson*, Sixth Circuit, 381 F.2d 523.

TENTH CIRCUIT: Mockery, sham or farce. *Johnson and Johnson v. U. S.*, Tenth Circuit, 380 F.2d 810.

An attorney who confessed that "He (the defendant) was a hard man to represent, he didn't recognize the importance of the facts in his own case, he couldn't follow counsel's advice . . ." "There were mean facts which I was never able to present to the jury because of circumstances beyond my control . . .", was held to be grossly inadequate in *Fortner v. Balkcom*, Fifth Circuit, 380 F.2d 816.

Merely because an attorney has a fatal heart attack shortly after the trial will not get any relief. *Rambo v. Peyton*, Fourth Circuit, 380 F.2d 363.

If a client commits perjury and then tells his attorney he committed perjury and the attorney, without author-

ization from the client, tells the court, and the client is not present when this conversation occurs, has the client been denied the effective assistance of counsel? It appears the answer is "Yes" by reading the opinion of *McKissick v. U. S.*, Fifth Circuit, 379 F.2d 754.

What happens if defense counsel has been misled by misstatements of the prosecution? In *U. S. v. Poole*, Seventh Circuit, 379 F.2d 645, the defendant obtained relief where it was shown that the complaining witness was supposed to have been examined by a certain doctor. Defense counsel tried to but did not locate this doctor. Apparently, this was the end of his investigation. After the jury verdict, defense counsel then learned that another doctor was the one who made the examination. Though the Court reversed on the basis of supervisory powers, it would appear that by the actions of the prosecution, the defendant was denied the effective assistance of counsel.

Circuit Judge Bell, in *Hintz v. Beto*, Fifth Circuit, 379 F.2d 937, writing for a unanimous Court, held that where the defense lawyer was given a psychiatric report the morning or day of the trial, although the result of same had been previously conveyed to the attorney, and the attorney moved for a continuance in order to examine and study the report, which was overruled, but no issue was made as to the defendant's mental condition during the trial, the defendant was denied the effective assistance of counsel.

The Court of Appeals for the District of Columbia in *Bruce v. U. S.*, 379 F.2d 113, Circuit Judge Leventhal writing the majority opinion and Judge Bazelon writing a dissenting opinion, denied relief to a defendant. However, some interesting things were brought forward:

Appellate counsel erects a structure of ineffective assistance of counsel resting on a foundation claim that appellant was given plainly erroneous advice by defense counsel, who considered that the crime of robbery had been established by appellant's presence when his companions decided to and did rob a store, and his sharing in the loot. Appellant's additional responses to the plea judge is explained substantially as follows—that it was because defendant was erroneously told by his counsel that he was guilty, that he answered "Yes" when the judge, after admonishing him to tell the truth and not to "dilly dally with this Court", asked him whether he knew before entering the High's store that a robbery was to take place there, and whether he had the intention of participating in that robbery. This background, argues counsel, shows that the guilty plea was not made "understandingly," i.e., understanding "the meaning of the charge, and what acts amount to being guilty of the charge," and that due to ineffective assistance of counsel appellant has never had his day in court.

We begin our analysis by putting aside for the time being the answers given by appellant at the plea proceeding. In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness. Although the cases are rare and extraordinary, it appears that an accused may obtain relief under 28 U.S.C. § 2255 if he shows both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.

It would not be fruitful to attempt further delineation of the applicable standard by reference to generalities,

except perhaps to say that a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for new trial either by the District Court or by this court on direct appeal.

Assuming for discussion that the requisite incompetence can be made out by showing an ignorance of critical doctrine discoverable with rudimentary preparation, we are not persuaded that this is such a case. The advice of defense counsel was not formulated, and cannot fairly now be supported, as a tactical estimate of a "high probability of conviction." But it is likewise plain that his advice that appellant's own statements showed him guilty was not based on the premise that he was guilty by virtue of mere presence and guilty knowledge, a premise that we have held unsound. The advice of defense counsel focused on the existence of a general plan to get some money by doing "mischief."

The fair import of counsel's testimony was, in short, that he understood it was agreed to rob someone, somewhere. That is how we take his questioned advice, particularly in view of appellant's failure, notwithstanding his burden, to define "mischief" further through either cross-examination of defense counsel or appellant's own testimony. Appellate counsel does not argue differently. His point is, apparently, that robbery requires the intent to take property from a particular victim, not merely a general intent to rob that remains unfocused.

Without saying whether or to what extent we agree with the decisions we now cite, we note that there is authority to support the proposition that when a person plans with others to rob someone, somewhere, his presence without protest at the scene of the crime undertaken by others is sufficient to constitute encouragement and sufficient participation for aiding

> and abetting. Again, without taking a position on the merits, we note that appellant's robbery guilt may be established under the rule that one who enters into a conspiracy to commit an offense is guilty of any substantive offense committed by his co-conspirators that is in furtherance of and a reasonably foreseeable consequence of the conspiracy.
>
> It may be that appellant would have fared better if his counsel had been more experienced, knowledgeable or aggressive, had sought to question or limit rather than apply the full measure of doctrines of vicarious liability. But certainly the doctrines cited refute the claim that the advice of defense counsel establishes that he lacked the minimum standards of competence necessary to satisfy appellant's constitutional right to counsel.

In *Greer v. Beto*, Fifth Circuit, 379 F.2d 923, the following is found:

> Under the facts before us, it is apparent that a sharp issue is presented as to whether appellant had the effective assistance of counsel, as was his due, at the trial in light of the undisputed fact that no medical evidence whatever, psychiatric or otherwise, was offered on the question of his sanity. His trial counsel testified by interrogatory that he did not know of any doctor who had examined appellant. His explanation, by a fair inference, was that appellant had only recently been found sane. This failure to offer testimony was compounded by the introduction into evidence of the jury verdict rendered in the sanity trial finding appellant sane. In addition the trial was before a different jury and the issue of insanity was being tried anew. We think that this, without more, makes out a prima facie case of ineffective or inadequate assistance of counsel.

Quarrels v. Dutton, Fifth Circuit, 379 F.2d 934, is an interesting case, to say the least, in that the defendant actually plead guilty to four indictments alleging a date at which time he was duly incarcerated by the officials of the State of Georgia. Circuit Judge Ainsworth pointed out that in the Court's original opinion, 354 F.2d 985, emphasis was placed on the adequacy of counsel. Still the Court held that, nevertheless, the lower Court was to determine what facts there were to show how the defendant plead guilty to a crime charged against him when he was incarcerated.

The fact that a client may feel he is more competent than the attorney in reference to the trial of a case is insufficient to sustain error. *Argo v. U. S.*, Ninth Circuit, 378 F.2d 301.

Circuit Judge Goldberg of the Fifth Circuit, in *Odom v. U. S.*, 377 F.2d 853, had the following to say regarding this very troublesome issue of ineffective assistance of counsel:

> A defendant is entitled to the effective assistance of counsel. Gideon v. Wainright, 1963, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Powell v. State of Alabama, 1932, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 159. We have found no Supreme Court decision basing a finding of deprivation of a fair and impartial trial on lack of effective appointed counsel, and lower courts have been somewhat less than explicit as to what does and does not constitute effective assistance. It is abundantly clear, however, that the guarantee does not underwrite errorless counsel, or successful counsel, or the best counsel available. It is equally true that errors of judgment and tactical errors on the part of any attorney do not constitute a denial of effective assistance. To be judged ineffective, counsel

must have been "* * * so incompetent as to deprive his client of a trial in any real sense" render the trial a mockery and a farce is one descriptive expression." Mitchell, supra, 259 F.2d at 793. Only if the attorney's conduct is "shocking to the conscience of the Court" can the charge of ineffective counsel prevail. Scott v. U. S., 6 Cir. 1964, 334 F.2d 72, cert. denied 379 U.S. 842, 84 S.Ct. 81, 13 L.Ed.2d 48.

Keeping in mind that Odom's allegations of ineffective assistance must be limited to matters ascertainable from the record, we turn to the facts of the case at bar. Appellant contends that his counsel was derelict in failing to object to questions put by the Court and propounded by the prosecutor and to arguments made by government counsel. At worst, these are tactical errors and are not misconduct amounting to ineffective representation. Counsel's omissions in this case are closely akin to those in Burton v. U. S., 1945, 80 U.S. App. D.C. 208, 151 F.2d 17, cert. denied 326 U.S. 789, 66 S.Ct. 473, 90 L.Ed. 479, where appellant alleged that his counsel in a murder trial was incompetent for failing to object to certain testimony and failing to rebut certain evidence. The court rejected these contentions on the ground that they constituted good trial strategy and added:

"But if this assumption were incorrect they would not be ground for reversal. There are few trials free from mistakes by counsel. After judgment and on appeal, errors in judgment as to the conduct of the defense are easy to point out. * * * Under such circumstances it is well settled that error in judgment, incompetency or mismanagement of the defense by counsel is generally not ground for a new trial." Id. at 18.

Moreover, trial counsel's effectiveness in the court below is established by our reversal of this case

> on a testimonial error to which counsel made timely objection. He who wars must sometimes win and sometimes lose. The Constitution, it must be remembered, commands a battle, but not a victory.

This is possibly the only case where trial counsel's effectiveness resulted in the defendant getting a new trial and at the same time being challenged as ineffective on appeal.

The Fourth Circuit in *Fields v. Peyton*, 375 F.2d 624, Circuit Judge Sobeloff writing the opinion, it was held that once a defendant made out a prima facie case of ineffective assistance of counsel, the burden of proving lack of prejudice shifts to the State. Thus, a late appointment and lack of preparation by counsel will make out a prima facie case of ineffective assistance of counsel.

It is not unusual for the Government or State to argue as in the case at Bar that because of counsel's excellent past reputation or because the defendant had stood before the bar of Justice at some time in the past, the defendant has not shown, regardless of the facts of the particular case, he had ineffective assistance of counsel. The Fourth Circuit has rejected the latter as "The right (to effective assistance of counsel) is not conditioned on the absence of a past criminal record." *Fields v. Peyton, Ibid.* The Eighth Circuit, in *Cardarella v. U. S.*, 375 F.2d 222, has also rejected the former contention, even though the attorneys were found to be competent and effective.

> True, the mere fact that persons on trial are represented by "four such distinguished lawyers" with "broad legal experience" (Judge Duncan's characterization) does not, of course, negative a charge that assistance of counsel in a specific case was ineffective

in the constitutional sense. However, no one reading the trial record in this case, as we have done, can fail to agree with the evident conclusion of Judge Duncan that the case was well tried for all defendants and with professional fidelity.

The rule applicable is that a charge of inadequate representation can prevail "only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court." O'Malley v. U. S., 6 Cir., 285 F.2d 733, 734 (1961). See also Mitchell v. U. S., 104 U.S. App. D.C. 57, 259 F.2d 787, 793 (1958), cert. den. 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86; Dayton v. U. S., 115 U.S. App. D.C. 341, 319 F.2d 742, 743 (1963), cert. den. 375 U.S. 947, 84 S.Ct. 357, 11 L.Ed.2d 277; Scott v. U. S., 6 Cir., 334 F.2d 72, 73 (1964), cert. den. 379 U.S. 917; and Frand v. U. S., 10 Cir., 301 F.2d 102, 103 (1962). In Frand, the principle was stated in this fashion:

"But the constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill. * * * It is instances in which resulting from the substandard level of the services of the attorney the trial becomes a mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to effective assistance of counsel."

May a defendant equate his attorney's intolerable rudeness with militant advocacy and obtain relief? Apparently not as seen in *Carter v. U. S.*, Ninth Circuit, 373 F.2d 911. From the opinion, it appears that a certain amount of hostility arose between the trial judge and trial counsel; sufficient to warrant a finding of contempt on the trial

attorney, which contempt was sustained on appeal. Thus, an accused, by *his* selection of counsel cannot take present advantage of unsuccessful tactics which could have been chosen with deliberate premeditation. What about court appointed counsel in the same situation?

In order to raise error for failure to call witnesses, it is incumbent on an accused that he name his witnesses and what they would have testified had they been called. See *Cowens v. Wainwright*, Fifth Circuit, 373 F.2d 34.

Concerning trial errors, Circuit Judge Smith of the Third Circuit said:

> It is well settled that errors committed during the trial of a criminal case in a state court are not subject to review in a habeas corpus proceeding in a federal court unless it is shown that the errors were so conspicuously prejudicial as to deprive the defendant of a fair trial. Jackson v. People of California, 336 F.2d 521, 524 (9th Cir. 1964); Pike v. Dickson, 323 F.2d 856, 860 (9th Cir. 1963), cert. den. 377 U.S. 908, 84 S.Ct. 1164, 12 L.Ed.2d 179; Harrison v. Boles, 307 F.2d 928, 931 (4th Cir. 1962). There was no such showing here. (U. S. of America ex rel James CANNON, Appellant v. James F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pa., No. 16201., 373 F.2d 908, (910)).

What is the status of an accused who claims he had ineffective assistance of counsel and there is presently no transcript available, no record on appeal and the trial attorney is deceased? By the Tenth Circuit in *Guerra v. Rodriguez*, 372 F.2d 472, he runs into a presumption that his trial attorney adequately protected his rights.

Ordinarily, when the district attorney makes full disclosure to either retained or court appointed counsel of

his file and this file is used to interview the defendant, even though this period of time may be relatively short, the defendant will usually obtain no relief on the grounds of ineffective assistance of counsel. See *Allen v. Rodriguez*, Tenth Circuit, 372 F.2d 116.

A defendant usually fares badly as to credibility where he does not attack the effectiveness of his trial attorney until a late date. The Tenth Circuit, at least, views the defendant's testimony with extreme caution when this occurs. See *Sobota v. Rodriguez*, Tenth Circuit, 371 F.2d 909.

A defendant who is, in part, contributorily negligent, if the Court please, as to obtaining counsel, will usually suffer for his own neglect. See *U. S. v. Barney*, Seventh Circuit, 371 F.2d 166.

Ordinarily, a defendant cannot impeach legal records. However, in *Holmes v. U. S.*, D.C. C.A., 370 F.2d 209, it was held the accused could impeach the records of the District of Columbia Court of General Sessions which showed a particular attorney was appointed for a preliminary hearing. However, the allegations were sufficient to raise the serious issue of whether the defendant was effectively denied a preliminary hearing and whether such denial was prejudicial.

As earlier mentioned, mere failure to make a particular objection is insufficient to gain relief. However, in *Stem v. Turner*, Fourth Circuit, 370 F.2d 895, it was held:

> But a failure by trial counsel to investigate, or vigorously to press, the illegality of the search under North Carolina law would be strong evidence of ineffectiveness of counsel unless waiver, measured by

federal standards . . . occurred as an element of trial strategy. (900).

What if trial counsel fails to object, when the objection would have been good, and the government subsequently puts on evidence which would have made the objection bad? He is not ineffective. In fact, his trial strategy may be deemed good. See *Weller v. U. S.*, Ninth Circuit, 369 F.2d 919.

The Fifth Circuit, as shown by *King v. Wainright*, 368 F.2d 57, has held that the defendant suffers for any mistakes retained counsel makes. There, the defendant did not receive direct appellate review because of a procedural error his retained counsel made. The Court held that this was not because of any action by the State. (59).

As previously mentioned, it is the totality of the circumstances of the case which will or will not render an attorney ineffective. In *Roberts v. Dutton*, Fifth Circuit, 368 F.2d 465, the attorneys who were court appointed were held ineffective. There, the Court took the cumulation theory and pointed out in the opinion the following:

1. Only one minor objection was made during the trial;
2. The trial lasted only approximately 1½ hours;
3. The charge was a capital offense;
4. The time spent in interviewing the defendant was relatively short and only one attorney did this;
5. The lack of thorough cross examination of one or more witnesses; and
6. The failure to assist the defendant in making a statement to the jury.

In other words, if the defendant had relied on just one item, he probably would not have received any relief.

Failure of the attorney to adduce proof of defendant's incompetency at time of trial when evidence was available will render the attorney ineffective. See *Owsley v. Peyton*, Fourth Circuit, 368 F.2d 1002.

In *Bell v. Alabama, Fifth Circuit*, 367 F.2d 243, Chief Judge Tuttle, writing for a unanimous court, in a case where a hearing was ordered on the defendant's allegations concerning ineffective assistance of counsel, said:

> Considering next the allegations that appellant did not receive the effective assistance of counsel, the applicable test is stated in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).
>
> It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Id. at 704. (Emphasis added.)
>
> It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant. Scott v. U. S., 334 F.2d 72 (6th Cir. 1964). Contentions strikingly similar to those made here were presented in Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962). A state prisoner alleged in his habeas corpus petition that his assigned counsel had entered the case only after he had entered a plea of guilty; that the plea had followed a coerced confession; and that counsel had advised

prisoner there was nothing he could do for him since he had already made a confession. In reversing the district court's dismissal of the petition, the court said:

"Especially striking is the petitioner's assertion that the court-appointed lawyer, after the most superficial contact with the case and without making inquiry into the circumstances, counselled surrender because the defendant had given a confession—a confession allegedly made under stress and coercion. No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea * * * or of the extra-judicial confession which induced the plea." Id. at 855. (Footnote omitted.)

An unusual case regarding trial counsel's actions is *Ingram v. Peyton*, Fourth Circuit, 367 F.2d 933. It was not shown whether trial counsel was court appointed or retained. After trial was concluded, through no fault of pre-trial investigation work done by trial counsel, it was learned by trial counsel that the complaining witness or chief witness had a prior conviction for perjury, but under a different name. This information was not conveyed to the defendant nor did trial counsel pursue the matter further and, in fact, it was not learned until 16 years later that this had occurred, together with the fact that a motion had been presented to the trial judge, which was denied. There was also a serious question of denial of appellate rights in this same case. The Fourth Circuit held that:

Looking to the substance of the matter, a prima facie case has been stated, whether treated as the petitioner contends, as a denial of the right of effective assistance of counsel, or as a deprivation of the right of appeal. (938).

A hearing has been granted where defendant's proofs showed he had been held incommunicado in several jails for four months following his arrest, received appointed counsel three days before trial, given a life sentence, no witnesses testified in his behalf at trial, no showing how confession of co-defendant was admissible, and no appeal was prosecuted from conviction. See *Mosley v. Dutton*, Fifth Circuit, 367 F.2d 913.

The Fourth Circuit in *Martin v. Virginia*, 365 F.2d 549, condemned and struck down Virginia's one-day indictment, designation of counsel, and trial rule. The Circuit Court adopted a statement of the District Judge, who said:

> "The Court recognizes that in each of these cases (dealing with effectiveness of court-appointed counsel's representation) the facts were different, but the principles are not different. The appellate courts have insisted that ample time be allowed counsel for preparation. They pointed to possible prejudice in some of the cases, but a showing of actual prejudice is not the basis on which these cases rest. The lack of opportunity for investigation, reflection, conference, and mature consideration which results from trials of felonies immediately after appointment of counsel provides the basis for granting the writ. * * * Courts need not look for specific prejudice. The burden isn't on the petitioner to show that he would profit by a trial in which counsel had more time for preparation. Lack of due process is implicit when a felon is tried immediately after the appointment of counsel. * * * To hold otherwise simply invites courts to continue the procedure that leads to pro forma representation. The State can show no compelling reason for indicting a felon, appointing counsel, and trying him all on the same day."

These and other cases, while differing in their particular facts, establish the principle that a lawyer's duty in representing a person charged with crime may not be discharged perfunctorily or mechanically. Representation is not adequate and a trial does not meet the standard of fundamental fairness if a court-appointed attorney fails to investigate and reflect upon his client's case.

The question is not one that can now be answered with any degree of certainty, nor need it be answered. The point is that because of the haste that marked the entire process this lawyer was simply in no position to evaluate his case and make considered judgments on these matters.

In *Braxton v. Peyton*, Fourth Circuit, 365 F.2d 563, another Virginia case, the lawyer was held not to be ineffective. However, Circuit Judge Sobeloff said:

Courts have a duty of vigilance to assure that appointed counsel shall give proper professional service to their indigent clients. Not only should the court make the appointment as promptly as possible, but the assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial. Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963). Compare Turner v. State of Maryland, 303 F.2d 507 (4th Cir. 1962), with Turner v. State of Maryland, 318 F.2d 852 (4th Cir. 1963). In the second Turner case this court, condemning the conduct of court-appointed counsel, admonished that "[w]hether a lawyer is employed by a prosperous defendant at a handsome fee or serves an indigent without compensation in the discharge of the duty

> resting upon him as an officer of the court, the canons of our profession require his entire devotion to the interest of the client; warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.' American Bar Association, Canons of Professional Ethics, Canon 15." 318 F.2d at 854.

Even though trial counsel may have some second thoughts himself about effective representation and, in fact, confesses that he felt his former client did not receive adequate and effective representation, his testimony is accorded minimal weight in the Tenth Circuit. In *Aline v. U. S.*, 365 F.2d 278, Circuit Judge Lewis said:

> We place no particular significance upon trial counsel's present view and testimony that he would adopt a different trial technique were he to try the case again. Such view merely reflects the natural subjective expectation of an unsuccessful advocate that improvement can be made the second time around. It is well within the trial court's discretion to accord such testimony minimal weight in determining whether counsel has been constitutionally effective in his representation. (279).

Along the same lines; the Fourth Circuit in *Sykes v. Virginia*, 364 F.2d 314, said:

> Every lawyer on the losing side of a case probably feels that if he had had a little more time he might have done something else which would have been helpful. (316).

In order to raise the issue that a defendant had been denied the effective assistance of counsel because the defendant's trial counsel did not demand a complete

transcript of the initial trial, it is necessary that the defendant set forth specific facts that might be obtained from the transcript of the first trial. See *Blackburn v. Crouse*, Tenth Circuit, 364 F.2d 804. However, the interesting question remains that how can you set forth specific facts without having the transcript?

What is the effect on the issue of effective assistance of counsel where the defendant's wife files statutory rape charges against the defendant for the rape of a step-daughter of the defendant and then informs the defendant's aunt of the events and the aunt employs counsel? Both the aunt and the wife told the lawyer they wanted the case disposed of quickly, quietly and with as little notoriety as possible in order to protect the child involved. It was held in *Whitaker v. Maryland*, Fourth Circuit, 362 F.2d 838, that counsel was serving an interest or interests which conflicted with that of relator.

The Second Circuit in *United States v. Follette*, 358 F.2d 922, said that neither the Court nor the State is a surety for the proper performance of counsel, whether retained or assigned, and hence the State is not responsible if the attorney's duty with regard to advice as to the right of appeal is not performed.

Perhaps the Fifth Circuit, as stated in *Busby v. Holman*, 356 F.2d 75, best put the issue and Respondent's contention. Even though relief was denied. Cf. Judge Rives dissent.

> In considering this contention of the appellant we must bear in mind that the constitutional requirement of effective assistance of counsel does not require or permit the court upon a subsequent review

to analyze counsel's mental processes in order to determine whether every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued. United States ex rel. Boucher v. Reincke, 2 Cir. 1965, 341 F.2d 977, 981. It is not counsel who is on trial. There can be held to be a lack of the effective assistance of counsel only when it appears that counsel's assistance was so grossly inept as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. Diggs v. Welch, 80 United States App. D.C. 5, 148 F.2d 667, 669. See, also Monroe v. Huff, 1944, 79 U.S. App. D.C. 246, 145 F.2d 249; Kinney v. United States, 10 Cir. 1949, 177 F.2d 895, and Rushing v. Wilkinson, 5 Cir. 1959, 272 F.2d 633, 638. Judge Minton well expressed the rule in United States ex rel. Kelley v. Ragen, 7 Cir. 1948, 166 F.2d 976, 980, as follows:

"* * * Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct might be considered on the proposition that such a trial was a denial of due process. The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce. * * *

> Petitions challenging the competency of counsel, especially years after the conviction, must clearly allege such a factual situation which if established by competent evidence would show the representation of counsel was such as to reduce the trial to a farce or a sham. Otherwise, they should be dismissed."

As Judge Seth said in *Williams* v. Cox, 10 Cir. 1965, 350 F.2d 847, 849:

> "* * * Although counsel conferred with appellant only briefly in the instant case, the record shows he was acquainted with him because of the previous appointment, and there is no indication that his representation of appellant in the case at bar was ineffective because of the brevity of consultation. No particular ritual is required in advising a criminal defendant of his fundamental rights. * * * Where, as in this case, the defendant appears in open court with his attorney who is competent to represent him and does so under circumstances fairly denoting that the attorney speaks for the defendant, who comprehends what is being done and its significance, and who acquiesces in counsel's statement that the defendant understands the charges brought against him and has been fully advised of his constitutional rights and enters a plea of guilty, such plea is valid."

In this case, during the hearing in the district court, the appellant sought to impeach his counsel's competency by showing that he was not a sober man. The appellant testified that he thought he smelled liquor on his counsel's breath. However, all the witnesses who testified on the subject stated that his counsel had a good reputation as a competent criminal lawyer, and the district court was fully justified in so finding.

Horne v. Peyton, Fourth Circuit, 356 F.2d 631, involved the interesting situation where the State of Virginia,

anticipating *Gideon*, supra, appointed a reputable attorney to represent several hundred previously convicted recidivists. In fact, on the day of the Defendant's trial, the attorney disposed of seventy-five other cases. The attorney, based on his investigation procedure, had a check-sheet to determine if the Defendant had counsel at his prior trial. It is not known from the opinion whether the defendant did or did not have counsel, other than counsel's investigation which did not encompass the checking of the records of the convictions. The Court held he was not ineffective as it was not shown that what he did not do did not show a harmful consequence to the defendant. Also, the defendant benefited immensely on the re-trial.

An attorney is not expected to predict what the future law will be. See *Stack v. Boyar*, Sixth Circuit, 354 F.2d 200. Attorneys who save "grateful" letters from clients usually save face at a later date. See *Stack, Ibid.*

Counsel at the habeas corpus hearing in *Hollis v. Beto*, Fifth Circuit, 352 F.2d 550, was held to be competent and adequate.

Merely because the trial attorney is found, subsequent to the trial, to have been physically and mentally and emotionally exhausted during the trial is insufficient to gain relief. See *U. S. v. Medlin*, Sixth Circuit, 353 F.2d 789.

The Second Circuit, in *U. S. v. Wilkins*, 351 F.2d 892, held that "Appellant is bound by the strategy which his counsel adopted. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), unless he was so inadequately represented as to make the trial a mockery of justice. *United States v. Garguilo*, 324 F. 795 (2d Cir., 1963)." (895).

The Sixth Circuit, in *Townsend v. Benner*, 351 F.2d 499, held that the due process clause of the Fourteenth Amendment requires the effective assistance of counsel in a criminal case. (501).

The Court's attention is directed to the excellent case of *Schaber v. Maxwell*, Sixth Circuit, 348 F.2d 664, wherein Circuit Judge Philips, writing the opinion for a unanimous Court, in a situation where the trial counsel failed to comply with Ohio procedural practice in entering a plea of not guilty by reason of insanity, said:

> This holding is not intended to be a reflection upon the character, integrity or professional reputation of either of the two court-appointed attorneys who represented petitioner in his criminal trial, both of whom are shown by the record to be reputable and experienced lawyers. We recognize that good lawyers can and do make mistakes; and in this case the mistake of counsel in a sense may have been induced by the failure of the trial court to indicate in any way that a written plea was necessary when counsel informed the court at the outset of the trial that petitioner was relying upon the defense that he was insane at the time of the commission of the crime.

The Ninth Circuit, in *Enriquez v. U. S.*, 338 F.2d 165, in a retained counsel situation, where the attorney who was critical of the lead trial counsel was also associate counsel during part of the trial, said that surmises that the attorney being critical of another attorney would not say that "they might have done better" is insufficient to warrant the Court in branding the defense as so inadequate as to amount to denial of the right to counsel."

In *Pineda v. Bailey and Beto*, Fifth Circuit, 340 F.2d 162, an attorney contacted the District Attorney's office in

El Paso and advised it that he would be available for court appointments. The office said they had a few persons who needed counsel. The attorney then went to the trial judge and told him he was representing the defendant. The attorney told the defendant that he had been appointed by the trial judge to represent him. The trial court learned of these circumstances prior to trial. At this time, the attorney was having his own personal problems with the Internal Revenue, the Grievance Committee and the newspapers. Although the District Court denied relief, the Fifth Circuit, speaking through Circuit Judge Hutcheson, held the lawyer to be ineffective.

Judge Rives of the Fifth Circuit, as noted above, holds an attorney to a high degree of professional care. In *Randazzo v. U. S.*, 339 F.2d 79, His Honor said that even if an accused has counsel of his own choosing, effective representation is lacking if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents are hobbled or fettered or restrained by commitments to others. (81).

In *Root v. Cunningham*, Fourth Circuit, 344 F.2d 1, Circuit Judge Christie said that "where an attorney gives his client his complete loyalty and serves his cause in good faith and to the best of his ability, the due process requirement for effective assistance of counsel is generally met." (3). "Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial." "This is especially true where, as here, the defendant chose and employed his own counsel." (3).

The Eighth Circuit, in *Hass v. U. S.*, 344 F.2d 56, held that "It well may be that a case of mail censorship could

result in deprivation of the effective assistance of counsel in derogation of the Sixth Amendment." "If, for example, the use of the mails constituted the only method whereby the defendant and his counsel could communicate with each other and such means of communication was censored, certainly the defendant then would have been deprived of his constitutional rights." However, in that case, the court did not so find. (67).

> The claim made in the appellant's brief that he was denied his constitutional right to competent counsel is without merit. He was not denied counsel; he selected his own counsel.
>
> Appellant's averment that he did not freely, voluntarily, understandingly, and intelligently enter his plea of guilty to this murder charge was based on the charge that he was subject to coercion and undue influence by one of his attorneys; that he was advised to enter a plea of guilty, or face, possibly, a sentence of death when, in truth and fact, the evidence would have shown that the man who was killed had attacked petitioner "twice before this alleged murder"; that the case, if properly presented, "would have resulted in a manslaughter conviction of murder in the second degree" that petitioner did not understand the nature of the charge against him or the consequence of his guilty plea; that petitioner's legal counsel were incompetent and did not protect his constitutional rights, and permitted the prosecution to deny petitioner his right to be confronted with his accusers.

With regard to the degrees of murder and the infliction of penalties therefor, we have recourse to the state law. Under the statutes of Tennessee, upon conviction of murder in the first degree, a jury is impanelled to hear the evidence and fix the terms of punishment, which shall be either the infliction

> of the death penalty, or imprisonment in the state penitentiary for life, or for some period over twenty years. Tennessee Code Annotated 39-2405.
>
> All kinds of murder, other than in the first degree, are, by the Tennessee Statute "deemed murder in the second degree." On a conviction for murder in the second degree, the penalty is imprisonment for not less than ten years nor more than twenty years. Tennessee Code Annotated 2408.
>
> The gist of appellant's complaint really is that he received a sentence of twenty-one years for first degree murder, instead of a possible, and probable, sentence of twenty years for second degree murder.

In *McCollum v. Bush*, Fifth Circuit, 344 F.2d 672, that Court held that a forty (40) minute psychological examination, during trial, at the noon recess, was State action and the State of Texas denied the defendant a fair trial and the effective assistance of counsel in adjudicating the defendant guilty and sentencing him to life imprisonment without any psychiatric testimony.

Thus, as the above cases reflect regarding the effective or adequate or competent trial counsel, there is a diversity of views as to what does or does not cumulate into either effective or ineffective representation.

As also previously noted, Federal Courts at the Circuit level have created certain metaphors:

> "farce," "mockery," "gross incompetence," "perfunctory," "substantial," "prejudicial," "bad faith," "sham," perfunctory, "pretense," "shocking to the conscience of the Court," "lack of opportunity for conference and preparation," "denial of fundamental fairness," "intergrity," "public reputation," "extreme circumstances."

It is respectfully submitted that regardless of whether counsel be retained, court appointed or even a volunteer he be held to the simple test, to-wit:

> Did trial counsel's representation of the accused from a totality of the circumstances of the particular case fall below minimum constitutional standards sufficiently to render either a lack of effective or adequate assistance, thereby depriving the accused of due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States?

With this simple standard, the facts of a particular case will control, not metaphors, which, without the facts of the particular case, are meaningless.

As to the issue of retained versus Court appointed counsel the distinction, if any, is truly a twentieth century novation. See Volume 65, Number 1, *United States Law Review*, January, 1931, pages 6-8, and Volume 24, *American Law Reporter, Annotated*, pp. 1025-1038.

The two (2) best discussions regarding this issue is seen in *Vavis v. Bamar*, supra, Sixth Circuit, 344 F.2d 84, and *Breedlove v. Beto*, Fifth Circuit, 404 F.2d 1019.

However, whether one uses the *Shelley v. Kramer*, supra, approach or some other approach the following is clear:

1. The accused can only be charged by the State or Government;
2. The accused can only be prosecuted by the State or Government;
3. The accused can only be convicted by agencies of the State or Government;

4. The accused can appeal his conviction only through the processes of the State or the Government;
5. The accused can only be represented at pre-trial, trial and post-trial proceedings by a licensed member of either the State or Government Bars. Cf. In re Ward, 28 Cal.2d 583, 170 P.2d 665 (1946).
6. The representative of the accused is certified by either the State or the Government to be competent and adequate.

Therefore, for an accused to be defended by an individual licensed by the State or Government; to be charged and prosecuted by either State or Government officials; and to be convicted by the agencies and processes of the State or Government and to say there is no State or Government action is reaching the incredible, to say the least.

Furthermore, what is so disastrous about granting a new trial where either retained or court appointed counsel are involved where counsel was incapacitated as a result of insanity, inebriation, illness or lack of professional capacity through want of legal training? See "Incompetent Counsel as Ground for New Trial in Criminal Cases." *Columbia Law Review*, 1947, Volume 47; pp. 115-122. Otherwise, "ignorance, blunders, and misapprehension of counsel" can become the rule of law.

By the facts of this cause, the following is clear:

1. Respondent had at trial a different attorney than the one whom his family retained;
2. The trial lasted a mere one hour and fifteen minutes;

3. The trial attorney neither interviewed nor attempted to interview favorable witnesses for the Respondent;
4. The trial attorney did not want the Respondent to plead not guilty;
5. The record and file of the trial attorney was absolutely bare of any pre-trial work;
6. The members of the Respondent's family were not told to be present at the trial because the trial attorney did not believe the trial judge would listen to any of them regarding mitigation;
7. There was no punishment hearing held after the Respondent was found guilty;
8. There was no pre-trial investigation by trial counsel;
9. There was no discussion of the law applicable to the case;
10. The rule was not invoked; thereby permitting the State's witnesses to remain in the courtroom during the trial;
11. No motion to suppress was filed;
12. Respondent's trial counsel asked of Respondent a highly damaging and prejudicial inadmissible question;
13. No motion for new trial was filed; and
14. Respondent was sentenced the same day he was found guilty.

It is, therefore, respectfully submitted, that the above is more than sufficient to render this representation below the minimum Constitutional requirements of effective assistance of counsel.

In summation, therefore, it is respectfully submitted that this Respondent did not have the effective and ad-

equate assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States and his conviction in the State court was, therefore obtained in violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin O. Teague, Attorney for the Respondent, Thaddeus King, Jr., and a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the above and foregoing Response to Petitioner's Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Petitioner's Attorney by depositing same in the United States Mail, postage prepaid, First Class, to Crawford C. Martin, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the _____ day of February, A.D. 1971.

MARVIN O. TEAGUE